UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
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UNITED STATES OF AMERICA,

Petitioner, No. 1:10-mc-109

vs. Hon. Gordon J. Quist

MICHIGAN DEPARTMENT OF COMMUNITY HEALTH, Hon. Hugh W. Brenneman, Jr.

Respondent.
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ANSWER IN OPPOSITION TO MOTIONS TO FILE AMICUS BRIEFS

Now comes the United States of America by its attorneys, Donald A. Davis, United States Attorney for the Western District of Michigan, and John C. Bruha, Assistant United States Attorney, and hereby responds to the motions by Cannabis Patients United (CPU) and Americans for Safe Access (ASA) for leave to file amicus briefs in this action as follows:

1. On January 25, 2011, the Cannabis Patients United (CPU) filed a motion for leave to file an amicus brief in this action, together with the proposed amicus brief, without consent of the parties. On January 27, 2011, the Americans for Safe Access (ASA) likewise filed a motion for leave to file an amicus brief in this action, together with the proposed amicus brief, without consent of the parties.

2. The proposed amicus briefs raise many of the same issues raised in the motion to intervene filed on behalf of the Michigan Association of Compassion Clubs (MACC) and 42 unnamed John or Jane Does, plus two additional issues the amici do not have standing to raise.

3. These motions are highly unusual, especially in a proceeding of this type.

Whether to grant amicus status is "within the sound discretion of the courts," and depends upon "a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice." *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). *See also Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007) ("a district court has broad discretion to grant or deny an appearance as amicus curiae in a given case"). "The orthodox view of amicus curiae was, and is, that of an *impartial* friend of the court – *not an adversary party in interest in the litigation*," although "some" courts have recognized a *"very limited* adversary support of given issues through brief and/or oral argument." *Michigan*, 940 at 164-65 (emphasis in original). Judge Posner of the Seventh Circuit has written that:

> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants briefs, in effect merely extending the length of the litigant's briefs. Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a party. We are beyond the original meaning now; an adversary role of an amicus curiae has become accepted. But there are, or at least there should be, limits.

Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062, 1063 (7th Cir. 1997) (J. Posner in chambers) (citing *Michigan*). An amicus is not a party to the proceeding, and cannot create, extend, or enlarge the issues in the proceeding. *See id.* at 165. "[N]or has an amicus curiae been conferred with the authority of an intervening party of right without complying with the requirements of Fed.R.Civ.P. 24(a), nor accorded permissible intervention without meeting the criteria of Fed.R.Civ.P. 24(b)." *Michigan*, 940 F.2d at 165. "*Only a named party or an intervening real party in interest is entitled to litigate on the merits.*" *Id.* at 166 (emphasis added). The filing of an amicus brief should not be used to address "wholly new issues not raised by the parties." *Citizens Against Casino Gambling,* 471 F. Supp. 2d at 311. In *Michigan*, the Sixth Circuit expressed concern about "convert(ing) the trial court into a free-wheeling forum of competing special interest groups capable of frustrating and undermining the ability of the named parties/real parties in interest to expeditiously resolve their own dispute and capable of complicating the court's ability to perform its judicial function." *Michigan*, 940 F.2d at 166.

4. Here, the proposed amicus briefs address many of the same issues already briefed by the proposed intervenors: the confidentiality provisions of the MMMA, physician-patient privilege and HIPPA, Fifth Amendment privilege, First Amendment right to communicate with their physicians, privacy issues, etc., and are duplicative in many respects. How many times does the Court have to read the same arguments? They also attempt to interject two additional issues that amici do not have standing to raise. The CPU brief attempts to inject a Tenth Amendment issue, which only the State of Michigan has standing to raise. *See United States v. Stacy*, 696 F. Supp. 2d 1141, 1144 (S.D. Cal. 2010) (rejecting similar Tenth Amendment claim in medical marijuana case because "[o]nly states have standing to pursue claims alleging violations of the Tenth Amendment by the federal government") (quoting *Oregon v. Legal Services, Corp*. 552 F.3d 965, 972 (9th Cir. 2009). "The mere enforcement of the (federal Controlled Substances Act) against individuals who are in compliance with California law does not interfere with the state's scheme for legalizing medical marijuana." *Stacy*, 696 F. Supp. 2d at 1145. Both amicus briefs also urge the Court to "quash" the subpoena pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure. First of all, neither a party, nor the proposed intervenors, have raised this

issue, so it may not be raised by an amicus.[1] Second, even if it could be, Rule 17(c) only addresses judicially issued subpoenas (which include grand jury subpoenas), and not agency administrative subpoenas. *See United States v. Phibbs*, 999 F.2d 1053, 1077 n. 8 (6th Cir. 1993) (§ 876 subpoenas are "distinct from Rule 17(c) of the Federal Rules of Criminal Procedure").

5. The motions for leave to file amicus briefs, and the motion to intervene, have created exactly the type of situation that the Supreme Court was concerned about in *Donaldson v. United States*, 400 U.S. 517 (1971). "A narrow reading of the intervention rule was thought necessary in Donaldson in order to protect the public interest in prompt and effective investigation and enforcement of the revenue laws." 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1908.1 (3d ed. 2007), at 307. For the same reasons that intervention was limited in *Donaldson,* leave to file amicus briefs should also be denied. *See United States v. Newman*, 441 F.2d 165, 173 (5th Cir. 1971). "Intervention in these circumstances is to be rejected ... because valid Congressional policies would be adversely affected if this 'outsider' were permitted to take over the controversy significantly. To permit this 'would unwarrantedly cast doubt upon and stultify the (agency's) every investigatory move.'" *Id.* at 173 (quoting *Donaldson*, 400 U.S. at 531). Here, CPU is urging the Court to "stay the proceedings and allow a full opportunity for the controversies at issue in this case to be addressed." (CPU Amicus Brief at 16.) In addition to further delaying this proceeding, that would encourage even more intervenors and amici, which would cause even more delay. This is the very type of delay that the *Donaldson* rule was intended to prevent. This proceeding has already been unduly delayed as

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[1] Contrary to the assertion at p. 7, n. 2 of ASA's amicus brief, the MDCH has not filed a motion to quash the subpoena.

it is. The proposed amicus briefs add nothing that can be considered by the court that is not already addressed in the brief of the proposed intervenors, which is before the Court whether or not intervention is granted. The proposed amicus briefs are clearly adversarial in nature, and the amici are attempting to accomplish, in the guise of amici, what they do not have standing to accomplish as parties or intervenors. That should not be allowed.

For the reasons stated above, the motion of the amici for leave to file amicus briefs should be DENIED.

Respectfully submitted,

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Dated: January 28, 2010

s/ *John C. Bruha*
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